Supreme Court, U.S.
FILED
JAN 21 1992
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92-1255

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

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RICHARD L. ARKIN

Petitioner

v.

GAITHERSBURG PUBLISHING COMPANY, INC., and
STEPHEN H. FISHER

Respondents

****

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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January 21, 1993

QUESTION PRESENTED

I. Does the article-in-suit state facts that (1) are capable of a defamatory determination, and (2) invade the right of privacy of Petitioner, a public figure, by depicting him in a false light in contravention of the First Amendment freedoms of speech and press as applied to the states through the Fourteenth Amendment due process clause?

LIST OF PARTIES

In the Circuit Court for Montgomery County, Petitioner, Richard L. Arkin was Plaintiff, and Respondents, Gaithersburg Publishing Company, Inc. and Stephen H. Fisher were Defendants.

In the Court of Special Appeals of Maryland, Petitioner was the Appellant and Respondents were Appellees.

In the Court of Appeals of Maryland, Petitioner was the Petitioner and Respondents were Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

The Petitioner, Richard L. Arkin, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland entered in the above-entitled proceeding on June 16, 1992.

OPINIONS, ORDERS AND CONCLUSIONS OF LAW BELOW

Reproductions of the following are included in the appendix to this petition:

Maryland Court of Appeals October 23, 1992 Order denying Arkin's Certiorari Petition.

Court of Special Appeals of Maryland, September Term, 1991, Case No. 1648, per curiam unreported opinion, filed June 16, 1992, affirming judgment of Circuit Court for Montgomery County.

Circuit Court for Montgomery County Order, filed August 27, 1991, denying Petitioner's Motion to Alter or Amend a Judgment (Judge William M. Cave).

Circuit Court for Montgomery County (Judge William M. Cave) transcribed hearing of July 8, 1991 opinion granting Respondents' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, as an Order to Dismiss.

Circuit Court for Montgomery County (Judge William M. Cave) transcribed hearing of April 3, 1991 opinion denying Respondents' Motion to Dismiss, and disagreeing with the Maryland appellate court defamation holdings relating to a public figure in Embrey v. Holley, 48 Md. App. 571 (1981), 293 Md. 128 (1982).

JURISDICTION

Jurisdiction of this Court to review the judgment of the Court of Special Appeals of Maryland by writ of certiorari is invoked under 28 U.S.C.A. § 1257(a).

By order dated October 23, 1992, the Court of Appeals of Maryland denied Arkin's certiorari petition, noted in 328 Md. 237.

By opinion filed June 16, 1992, the Court of Special Appeals of Maryland affirmed the Circuit Court for Montgomery County's judgment, unreported case no. 1648, September Term, 1991, noted in 92 Md. App. 734.

By Order filed August 27, 1991, the Circuit Court for Montgomery County denied Arkin's Motion to Alter or Amend a Judgment.

By Order of July 8, 1991, the Circuit Court for Montgomery County granted Defendants' Motion to Dismiss after Defendants filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment.

CONSTITUTIONAL PROVISIONS, ORDINANCES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION 1 (pertinent part)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jursidiction the equal protection of the laws.

ROCKVILLE CITY CODE

Sec. 8-1. Definitions

Political committee means any combination of two (2) or more persons appointed by a candidate, or candidates, or any other person or

formed in any other manner which has as a principal purpose to assist or attempt to assist in any manner the promotion of the success or defeat of any candidate, candidates, principle or proposition which has been, will be, or is being sought to be submitted to a vote at any City election.

Sec. 8-111. Violation of chapter declared misdemeanor; penalty for violations.

Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars ($1,000.00) or be imprisoned for not more than six (6) months, or both, in the discretion of the court and shall be ineligible for any public office, for the period of four (4) years from and after the time of the commission of such offense. If a different penalty is specifically prescribed for violation of any section in this chapter and expressly set forth therein, the specific penalty applies and the penalty set forth in this section does not apply.

MUNICIPAL CHARTER OF ROCKVILLE

ARTICLE II

The Mayor and Council

Section 1. Number, Selection, Term, Qualification, and Payment

b. The Mayor and Councilmembers shall be registered voters and shall have resided in the city for at least one year immediately preceding their election.

STATEMENT OF THE CASE

Petitioner Arkin's Rockville house burned down due to unknown causes, and while it was undergoing repair, he moved to Gaithersburg for an anticipated temporary sojourn; meanwhile he ran for election to the Rockville city council. He maintained his voting residence in Rockville while living in temporary lodging in Gaithersburg prior to election day. Ultimately, he lost the election. His candidacy was run with a political committee of 2 persons. After the election, Arkin filed a complaint with the Rockville Board of Election Supervisors against a rival political organization, the Alliance of Rockville Citizens (ARC), alleging violation of Rockville election law. Seventeen days later, Arkin filed an amended complaint against ARC. Respondent Fisher was treasurer of ARC at all times material to the complaint that was ultimately sustained by the Board of Election Supervisors. About 1 week

after Arkin filed his amended complaint (some 50 days after election day), Fisher authored an article (25-29A) published in the Rockville Gazette, a newspaper owned by co-Respondent Gaithersburg Publishing Company, Inc. Arkin, distressed by the article, sued Respondents for 6 counts each of libel and false light invasion of privacy arising alternatively from the same statements in the article. After proceedings in courts below, 3 counts each of the same torts are at issue in this Court (38-49A). Arkin alleged that 3 parts of the article created a false impression that he (1) was dishonest as a candidate by maintaining a permanent residence outside of Rockville while running for Rockville public office, (2) committed arson, and (3) violated Rockville election law by running with an illegally constituted election committee. The suit also alleged he was put into 3 different false lights which he found objectionable. Respondents moved to Dismiss the Complaint for

failure to state a claim upon which relief could be granted. In a memorandum in support of their Motion, Respondents first argued that the statements at issue were privileged under the First Amendment as opinion and as rhetorical hyperbole, and were intended to lampoon Arkin. In an opposing reply memorandum, Arkin argued that (1) the statements at issue were not First Amendment protected because they could be read as stating facts capable of being objectively characterized as true or false, (2) other companion statements consisting of rhetorical hyperbole in the article did not render the statements at issue as statements of rhetorical hyperbole, (3) intent to lampoon and not to defame was an insufficient defense to defamation when the expression of ridicule implied the assertion of a factual charge that would be defamatory if made expressly, (4) taken as a whole, each statement at issue for libel did not concern ongoing political debate or issue dis-

pute, but focused on belittling and defaming Arkin by interweaving hyperbolic derogatory statements with defamatory ones because Arkin filed a complaint against ARC, (5) the article said nothing about the complaint's content, (6) the statements at issue were certainly capable of being found highly offensive by Arkin, and (7) dismissal of the libel counts provided no reason for dismissing the false light invasion of privacy counts.

At a hearing, Respondents argued that the article was

> "core political speech at the heart of the First Amendment" which if
>
> "allowed to proceed to trial or further factual discovery up to a summary judgment motion, we are seriously chilling formidable political expression."

Arkin argued that the article's context

> "had nothing to do with political belief; it had something to do with an act that he did and he had the right to do that on what they call the right to petition for redress of grievances."

Arkin's argument added that

> "all he did was file a complaint whose content was not divulged in the article and the person writing it had the motive to do so because he was one of the people who was involved directly in that complaint."

The motions judge denied Respondents' motion, stating that procedurally, a Motion for Summary Judgment might be more appropriate. The motions judge also commented

> "it looks like the Courts keep waffling along on the First Amendment"

and argument was advanced on behalf of Respondents

> "I suspect that our Court is a little stronger than the big Court" (35A).

Respondents filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, seeking dismissal. Arkin opposed it. At a hearing thereon, Respondents argued that because of First Amendment considerations,

> "you must first make a legal determination before you ever get to proof -- are the statements in question reasonably capable of containing the defamatory meanings alleged. What you do to make that determination, first and foremost is to look at the context of the article, the language used, and

> the social context in which that article appeared. When it is political speech, you give the broadest possible First Amendment protection. Using that test here, it is clear that the article, as a whole, is hyperbole."

The motions judge found the article's statements at issue to consist of rhetorical hyperbole as to libel, called it opinion as to invasion of privacy, and granted Respondents' Motion to Dismiss. (30-32A). Arkin filed a Motion to Alter or Amend a Judgment which the lower Court denied without a hearing (33A).

Arkin appealed to the Court of Special Appeals of Maryland on 3 counts each of libel and false light invasion of privacy from 3 statements in the article (38-49A), and the parties reargued in their briefs and at oral argument, the points discussed above with regard to the First Amendment. The Court of Special Appeals affirmed the lower Court judgment (1-24A). Arkin filed a certiorari petition in the Court of Appeals of Maryland which denied it by Order dated October 23, 1992 (37A).

REASONS FOR GRANTING THE WRIT

I. The Court of Special Appeals of Maryland, an intermediate appellate state court, has decided the first amendment question herein, in a way that conflicts with its decision in another case that was affirmed by the state's highest court, the Court of Appeals of Maryland.

In Embrey v. Holley, 48 Md. App. 571 (1981), 293 Md. 128 (1982) both appellate courts found actionable defamation where radio personality Johnny Walker said over the air about public figure newsman Dennis Holley

> "Too bad about Dennis Holley, though. Hope he comes out okay. Wonder how he hurt his knee. Probably fell down carrying that TV during the blizzard last week, right?"

The Court of Special Appeals said in Embrey, supra, at 579 that a publication is libelous per se and presumed to be injurious to one's reputation if, on its face, the

> "words themselves impute the defamatory character"

Johnny Walker created the false impression or imputed that Dennis Holley stole television sets during a blizzard that blanketed Baltimore.

The Court of Special Appeals in Embrey, supra, states

> "It is of no importance that the joke was intended to be humorous because the test is not intention, but how it was understood by a third person."

Both Maryland appellate Courts concluded that the statement intended as a joke was capable of exposing Holley to public ridicule, injuring his reputation as a public figure and thus defamaing him, therefore it was deemed actionable by Holley.

The Court of Special Appeals added in Embrey, supra,

> "The line between 'non-actionable humor' and 'compensable libel' is not only vague but dependent upon the audience who hears it and the context in which it was made."

A jury was allowed to weigh evidence of the testimony of third persons who heard the

broadcast before finding for Holley.

The judge from the Circuit Court for Montgomery County opined that if the Court of Special Appeals had the opportunity to revisit Embrey, it may have come out with a different result (36A). Even though the parties cited Embrey in their briefs in the Court of Special Appeals, and counsel for Arkin argued the Embrey case at its oral argument, that Court never mentioned it once in its opinion (1-24A).

The article about Arkin is easier to determine as actionable in defamation than the radio broadcast in Embrey, supra because while the intent in Embrey was that of humor, the intent can be read that the overall context of the article was the character assassination of Arkin. The author Fisher had a motive to belittle Arkin because of Arkin's complaint against the ARC, the group of which Fisher was treasurer.

II. The Court of Special Appeals decision conflicts with a customary requirement in determining whether the Circuit Court for Montgomery County correctly decided whether a statement is capable of a defamatory determination.

The Court of Special Appeals (CSA) opinion at p. 4 (7A) cites Batson v. Shiflett, 325 Md. 684, 723 for the proposition

> "If words are capable of more than one meaning or a defamatory meaning could be inferred, then the meaning to be attributed to them is a question of fact for the jury."

and for reasons explained below contradicts that proposition.

Counts I and II

The opinion at p. 7 (13A) discusses Count I and says

> "By definition, true statements are not defamatory."

and cites Phillips v. Washington Magazine, 58 Md. App. 30 (1984) and cases cited therein. This point arose because Respondent Fisher published true statements without telling the

whole story, i.e., the article states that Arkin was a year-long Gaithersburg resident, used the return address of an unoccupied Rockville house to file a complaint, and had run for Rockville city council. The article did not state that Arkin's house had burned down and that he intended to temporarily sojourn in Gaithersburg while his Rockville house was undergoing repair as Respondents knew. The statements make Arkin appear dishonest by running as an outsider against local law requirements. What counts is how the newspaper article is viewed through the eyes of a reader of average interest.

> "Partial truths are not necessarily even mitigating in this branch of the law, for the defamer may be the more successful when he baits the hook with truth."

Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 655 (1966) (en banc), quoted with approval, Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2698 n. 37

(1989), Tavoulareas v. Piro, 817 F.2d 762, 787 (1987). The CSA opinion at p. 6 (11A) refers to the Charter of the City of Rockville art. II, sec 1b (1990) which discusses the one year residency requirement of city councilmembers (p.6). The CSA opinion at p. 6 (12A) also refers to the term "resident" as "living in a place for some length of time" in Webster's Ninth New Collegiate Dictionary 1003 (1988). The word "resident" as used in the article is a noun. The same dictionary defines the noun form of the word as "one who resides in a place." The verb "reside" is defined by the same dictionary as "to dwell permanently or continuously; occupy the place as one's legal domicile." A domicile is defined by the same dictionary as "a dwelling place, place of residence, home." "a person's fixed, permanent, and principal home for legal purposes." The CSA opinion stated that the article meant a "resident" is one "living in a place for some length of time," a defin-

ition of the adjectival form of the word, not the noun form. In order for the CSA's definition to be correct, the sentence would have been written differently, e.g., "Arkin, then resident in Gaithersburg..." Therefore, the CSA's construction of the term "resident" was not in agreement with that of the above-cited dictionary. Accordingly, given their "ordinary and natural meaning," the statements in the article quite clearly do imply that Arkin changed his place of "legal residency" from Rockville to Gaithersburg. Moreover, when the article is read as a whole, the words therein are certainly intended to convey the impression that Arkin abandoned his home and moved his permanent place of residency from Rockville to Gaithersburg. For reasons stated, the lower Courts should have found that the article's words regarding Count I were at a minimum, capable of a defamatory determination, and should not have dismissed the Count. Since a reasonable person could find such an article highly

offensive or objectionable, regardless of whether his reputation is damaged, he has a valid claim for false light invasion of privacy (even if the corresponding libel count were validly dismissed) as stated in Count II.

Counts III and IV

For Count III, Respondent Fisher knew that Arkin's house burned down, as did many others, yet the article ends with

> "Perhaps Mr. Arkin has forgotten that it is unwise for childish people to play with matches."

The article also contained 9 fire-related phrases that add weight to the implication that Arkin committed arson. The lower Courts had reason to know that the statements about arson at issue were reasonably capable of a defamatory determination and should not have dismissed Count III. With regard to Count IV, it can be considered objectionable or highly offensive to Arkin, therefore the false light invasion of privacy Count is actionable, even if the libel count was not.

Counts V and VI

For Count V the article states that Arkin ran without a "properly constituted election committee" and adds that he won the endorsement of his group of "one." Section 8-1 of the Rockville City Code defines "political committee" as "any combination of two or more persons appointed by a candidate ---"(pp.4-5). The article falsely states that Arkin's committee was not properly constituted and the hyperbolic word, "one" adds defamatory weight to the statement of provable fact. The Court of Special Appeals' reading on p. 9 (18A) that the thrust of the statement was that Arkin's candidacy lacked meaningful support is one of at least two meanings that could be ascribed. Count V in libel should have been referred as a question of fact to a jury. Batson, supra. The lower Courts should have found that the words at issue, at a minimum, were capable of a defamatory determination, and should not have dis-

missed Count V. Violation of that city ordinance subjects a violator to imprisonment, under Sec. 8-111 of the Rockville City Code (p.5). A reasonable person could find the statement objectionable or highly offensive as did Arkin in Count VI. Therefore, Arkin has a valid claim under false light invasion of privacy in Count VI.

The First Amendment does not protect the article as privileged opinion because it can be read as express and implied factual statements capable of being objectively characterized as true or false as in Milkovich v. Lorain Journal Co., 111 L.Ed 2d 1 (1990).

Because the article interweaves exaggerated statements with actual statements of fact, Respondents convinced the lower Courts to overlook statements of fact which were not statements of rhetorical hyperbole, hence they are not privileged under the First Amendment.

In Time, Inc. v. Hill, 385 U.S. 324

(1967), this Court held that in false light invasion of privacy cases, a public official cannot recover unless he/she proves by clear and convincing evidence that the Defendant had knowledge of the falsity of the statement or acted in reckless disregard of its truth or falsity. This holding reinforces the actionability of Arkin, a public figure, for false light invasion of privacy.

Because the aforegoing relates to First Amendment freedoms of speech and the press as determined by state Courts, the question presented is phrased as taking into account how that determination applies to the states through the 14th Amendment due process clause.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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January 21, 1993

APPENDIX

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1648

September Term, 1991

RICHARD L. ARKIN

v.

GAITHERSBURG PUBLISHING
COMPANY, INC., et al

Wilner, C.J.
Bell,
Motz,

JJ.

PER CURIAM

Filed: June 16, 1992

This appeal involves the propriety of the grant of a motion to dismiss a complaint alleging libel and false light invasion of privacy.

(i)

In 1989, appellant, Richard L. Arkin (Arkin), sought election to the Rockville City Council; he was unsuccessful in his bid for political office. Less than one month after the November general election, Arkin filed a series of complaints with the Rockville Board of Supervisors of Elections (the Board of Elections), claiming that a rival political organization, the Alliance of Rockville Citizens (ARC), had violated local election law. The Board of Elections ultimately sustained Arkin's complaint.

Arkin's campaign for political office, his political organization, and his complaints against ARC were the subject of an article written by appellee, Stephen Fisher (Fisher), which appeared in the December 27, 1989 edition

of the Rockville Gazette.[1] (Fisher is the chairperson of ARC, as well as a reporter for the Rockville Gazette which is owned by appellee, Gaithersburg Publishing Company, Inc. ("Gaithersburg Publishing").) The article was entitled, "I am Confident Arkin's Complaints Portend Little Risk to ARC." It appeared inside of the paper on page A14 which was titled "OPINION." This "OPINION" page is entirely filled by three articles; each consuming one third of the page horizontally. The article at issue here is at the bottom of the "OPINION" page.

[-2-]

Upset by the article, Arkin filed a twelve-count complaint in the Circuit Court for Montgomery County against Fisher and Gaithersburg Publishing (collectively the defendants or appellees), alleging six counts of defamation and six corresponding counts of false

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[1]A copy of the article is attached as an appendix to this opinion.

light invasion of privacy, all based on the same 654 word article. The defendants filed a motion to dismiss on the ground that Arkin failed to state a claim upon which relief could be granted; Arkin opposed the motion. After hearing argument, the circuit court denied the motion to dismiss with leave to file a motion for reconsideration. Arkin voluntarily dismissed two libel counts and two false light invasion of privacy counts (Counts IX-XII), leaving a complaint containing eight counts - four based on libel, four on false light invasion of privacy. The defendants then filed a motion for reconsideration of the motion to dismiss, or in the alternative, a motion for summary judgment.[2] After another hearing, the

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[2]Arkin contends that the defendants improperly forwarded "ex parte" courtesy copies of their motion for reconsideration and opposition to motion to alter or amend judgment directly to the circuit judge. In fact, the defendants sent copies of all correspondence

circuit court dismissed all of Arkin's claims, ruling that the article, read as a whole, was not defamatory and did not constitute a false light invasion of privacy, but rather, was "rhetorical hyperbole." Arkin appeals from the dismissal of Counts I-VA; he does not appeal the dismissal of Counts VII and VIII.

[-3-]

(i)

The question of whether a statement is defamatory is a question of law properly decided by the trial court on a motion to dismiss. Bowie v. Evening News, 148 Md. 569, 572 (1925); Kilgour v. Evening Star Newspaper Co., 96 Md. 16, 23 (1902); Phillips v. Washington Magazine, 58 Md.App. 30, 37, cert. denied, 30 Md. 89 (1984). In order to succeed in an action for

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with the court to counsel for Arkin, thus there were no ex parte communications. See Md. Rule 1-351 (1992).

libel a public figure[3] must plead and prove that the defendant's communication, as a whole, was: (1) defamatory in meaning; (2) false; (3) made with actual malice; and (4) caused injury to the plaintiff. See Batson v. Shiflett, 325 Md. 684, 722 (1992).

"A defamatory statement is one which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person." Id. at 722-23; Bowie v. Evening News, 148 Md. 569, 574 (1925). The threshold question of whether a publication is defamatory in and of itself (libel per se), or whether, in light of the intrinsic facts, it is reasonably capable of defamatory interpretation (libel per quod), is for the court, upon reviewing the statement as a whole. Batson, supra, at 723. Words have different meanings defending on the

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[3]Arkin, on appeal, does not dispute his status as a public figure.

context in which they are used, and a meaning not warranted by the whole publication should not be imputed. Id.; Hohman v,. A.S.Abell Co., 44 Md. App. 193, 197 (1979) (citing Flaks v. Clark, 142 Md. 377,

[-4-]

382 (1923). If words are capable of more than one meaning or a defamatory meaning could be inferred, then the meaning to be attributed to them is a question of fact for the jury. Batson, supra, 325 Md. at 723.

Here, the trial court held as a threshold matter that the article was not capable of defamatory meaning. That holding was correct, not because the article was labelled "OPINION," but because it was permeated with the "sort of loose, figurative or hyperbolic language which" negated "the impression that the writer was seriously maintaining" that Arkin had committed a crime. Id. at 725 (quoting Mikovich v. Lorian Jouran Co., _____ U.S. _____, 110 S.Ct. 2615, 2707 (1990)). For example, Fisher characterizes

Arkin as having a "self-designed litmus test for civic responsibility," of being endorsed by "his personally organized citizen group of one, known as ASS," of supporting "the death penalty . . . for those who make him cross," and having "a doctorate in political quackery." Courts have long held that similar nasty, but hyperbolic, language is not defamatory because, in context, it is clear that it was not meant by the writer to be taken literally, and is not capable of proof one way or the other. See, e.g., Greenbelt Pub. Ass'n v. Bresler, 398 U.S. 6, 14, 15 (1970) (use of the word "blackmail" to characterize developer's negotiation position with city council was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable"); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (First Amendment precluded recovery

under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figures involved"); Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" in literary definition of union "scab" was not basis for defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"); Yiamouyiannis v. Thompson, 764 S.W.2d 338, 341 (Tex. 1988), cert. denied, 110 S.Ct. 722 (1989) (in context of referendum campaign to authorize fluoridated water, charges that opponent of fluoridation was a "quack," a "hoke artist," and a "fearmonger" are "vintage hyperbole"); Blouin v. Anton, 431 A.2d 489, 490-91 (Vt. 1981) (in "context of a political skirmish" defendant's references to political foe as "horse's ass," "idiot" and paranoid" are "insulting, abusive,

unpleasant, and objectionable" but are not "libelous").[4]

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[4]See also Ault v. Hustler Magazine, Inc., 860 F.2d 877, 879-81 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989) (characterization of pornographer opponent as "wacko" and "Asshole of the Month" nonactionable); Leidholdt v. L.F.P., Inc., 860 F.2d 890, 892-93 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989) (to the same effect); Church of Scientology v. Cazares, 638 F.2d 1272, 1287-89 (5th Cir.) (statements describing Church as "helter-skelter," "rip off, money motivation operation" and "paramilitary religious organization" are not defamatory); Henderson v. Times Mirror Co., 669 F.Supp. 356, 359-60 (D.Colo. 1987), aff'd, 876 F.2d 108 (10th Cir. 1989) (expression "sleezebag" who "slimed up from the Bayou" is protected rhetorical hyperbole); Moyer v. Amador Valley Joint Union High School district, 275 Cal Rptr. 494, 225 Cal. App. 3d 270 (1990) (terms "worst teacher," "babbler," and "terrorized"

Individual analysis of each of the three portions of the article that Arkin asserts is defamatory supports this conclusion. In Count I, Arkin claims that certain statements in the article are defamatory because they imply that he violated Rockville election law by maintaining a permanent residence outside of Rockville while running for Rockville public office. See Charter of the City of Rockville art. II, sec. 1b (1990). The language which Arkin claims defamatory in Count I is:

> [S]omeone by the name of Richard Arkin, using the return address of an unoccupied house in the West End of Rockville, made two attempts to file a formal complaint against the Alliance or Rockville Citizens for having failed his self-designed litmus test for civic responsibility.

---

where nonactionable hyperbole).

> Mr. Arkin, a year-long resident of Gaithersburg, is believed to have filed and stood for Rockville City Council last month as a slate of one.

(emphasis added).

In determining whether statements are defamatory, the court must give the words their "ordinary and natural meaning." Koren v. Capital-Gazette Newspapers, Inc., 22 Md. App. 576, 589, cert. denied, 273 Md. 721 (1974). The underscored statements, on their face and given their ordinary meaning, do not imply that Arkin had changed his place of "legal residency" from Rockville to Gaithersburg. See 69 Op. Att'y Gen'l 238 (1984). Rather, the article simply states that Arkin was a "resident" of Gaithersburg, i.e., "living in a place for some length of time" and that his Rockville address was "unoccupied," i.e., "not lived in." Webster's Ninth New Collegiate Dictionary 1003

(1988). These statements were a true and accurate description of Arkin's living

[-7-]

arrangements during the period leading up to the election. Indeed, Arkin, himself, conceded the truth of the statements at the hearing. By definition, true statements are not defamatory. supra, 58 Md. App. at 36 (and cases cited therein). Thus, the statements in Count I do not constitute libel per se.[5]

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[5]Even assuming that the article falsely implied that Arkin permanently "abandoned" his home in Rockville and became a "legal resident" of Gaithersburg before he ran for public office in Rockville, this alone is not sufficient to sustain a claim of libel per se. See Sherrard v. Hull, 53 Md. App. 553, 579 aff'd, 296 Md. 189 (1983), overruled on other grounds, 384 Md. 164 (1985) (holding that a statement, made by a public figure in front a county board of zoning, that she "would like to know how much money it cost [her opponent for the rezoning]," was not

Nor do they constitute libel per quod. In Metromedia, Inc. v. Hillman, 285 Md. 161 (1979), the Court of Appeals explained the difference between libel per se and libel per quod:

> [T]he only distinction remaining in Maryland between a libel per se and a libel per quod is that to recover the plaintiff must first show that the publication is defamatory. Where the words themselves impute the defamatory character, no innuendo -- no allegation or proof of extrinsic facts -- is necessary; but otherwise, it is. This is both a pleading rule and an evidentiary requirement. Where extrinsic facts must be shown in order to establish the defamatory character of the words sued upon [libel per quod], the omission to plead them makes the complaint

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defamatory per se).

demurrable for failure to state a cause of action.

Id., at 172-73. In an attempt to plead extrinsic facts that would establish the defamatory character of the words sued upon in Count I, Arkin alleges that the underscored statements imply that "the Arkin family moved away from Rockville to Gaithersburg, and the Plaintiff violated Rockville election laws by running for a City of Rockville public office while residing outside of that city."

[-8-]

Arkin claims that, had he won the election and become a Rockville City council member, statements about his residence would have implied that he had violated a requirement of the Rockville Municipal "Charter that Council members have resided in Rockville for at least one year immediately preceding their election. Charter of the City of Rockville art. II, sec. 1b (1990). The operative words here are "had [Arkin] won the election;" he did not, and thus,

committed no crime. (The Rockville Charter, contrary to Arkin's contention, provides no penalty for an attempted violation of one of its provisions. See art. IVX, sec. 4.) Arkin also contends that statements in the article about his residence implied that he violated Maryland election law requirements that a registered voter in Rockville be a Rockville resident, Md. Code Ann. art 33, § 3-4 (1990); take an oath of truth regarding, inter alia, the voter's place of residency, art. 33 § 3-6; notify the Board of Elections if the voter moves from the address specified in the voter's registration, art. 33, § 3-8(a)(3), and not register falsely to vote in Rockville, art. 33, § 24-12. Nowhere in the article is Arkin's voter registration status mentioned; the article was confined purely to his status as a candidate. There is no indication in the article as to where Arkin was registered to vote, or to where he did, in fact, vote. Nor did Arkin plead these facts in his complaint. According, alleging that Arkin was

a legal resident of Gaithersburg does not, without more, imply a violation of the state election laws.

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Arkin also alleged libel per se in Count V. of the complaint. The language he there claimed was defamatory is contained in the part of the article which characterized his campaign efforts as:

> Running mostly under pretense and without the support of a properly constituted election committee, Mr. Arkin nevertheless won the ringing endorsement of his personally organized citizen group of one known as ASS, or Arkin Seems Sensible.

Arkin initially claims that the statement that he ran for office "without the support of a properly constituted election committee," constituted libel per se because it implied that he violated the Rockville election laws. This claim fails because the ordinary meaning of the

statement, on its face (like that complained of in Count I), does not impute the defamatory character. Nor do the extrinsic fact pled by Arkin in Count V, i.e., the requirements under the Rockville Code for a "properly constituted election committee," establish the defamatory character of the statement. The clear thrust of the statement is not that he had violated the election laws by having an "improperly" constituted election committee, but that Arkin's candidacy lacked meaningful support. Indeed, in the same sentence, Arkin's committee is captioned as "ASS, or Arkin Seems Sensible." Thus, the trial court did not err in dismissing Count V of Arkin's complaint.

Arkin alleges, in Count III of the complaint, that he was defamed by a single sentence: "Perhaps Mr. Arkin has forgotten that it is unwise for children to play with matches." He claims that this sentence amounted to libel per quod because the article made it "falsely

appear (to those persons who knew of his house being

[-10-]

damaged by fire) that fire to the Arkin residence resulted from an act of arson committed by [him]." The only extrinsic fact plead by Arkin in this count was that Arkin's house was damaged by fire. This fact alone was clearly insufficient to establish the defamatory character of the words. Moreover, Arkin's interpretation of this sentence ignores the context of the article, which discusses Arkin's unsuccessful candidacy for local office and the complaints filed by Arkin against the ARC. In reference to Arkin's attacks on the ARC, Fisher used other metaphors of fire to drive home his point.[6] See Greenbelt Co-op. Pub. Ass'n v.

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[6]The other parts of the article state:

> Through such authoritative evidence as might be gleaned from a reading of my columns, which Mr. Arkin has

previously dismissed as infantile babbling, he presents a case of conjecture in which all manner of convoluted reasoning and tortured logic are used to form a funeral pyre upon which he believes he has staked ARC, and to which he now asks the Board of Elections to kindly lend their torch.

Though I am confident at this point that Mr. Arkin's scattering small tinder about a ropeless stake portends little serious risk to ARC or the Team for Rockville '89, I do wonder when the spark of all consuming hatred which imbues Mr. Arkin's soul and which he so carelessly strikes in the presence of his perceived enemies might well find fuel in the flatulence of his own

Bresler, 398 U.S. 6, 11-14 (1970). Nowhere does the article accuse Arkin of committing the crime of arson. As in Bresler, "even the most careless reader would have perceived the statement at issue as rhetorical hyperbole."

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In sum, the circuit court did not err in finding that the complaint was not sufficient, on its face, to sustain a cause of action in defamation, and thus in dismissing Counts I, III and V.

(iii)

In the remaining counts - Counts II, IV, and VI - Arkin asserted that the same statements that were the subject of his defamation claims were also actionable as false light invasions of privacy. The trial court dismissed these claims, stating "[t]he fact that the election had been over for some 50 days doesn't make

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rhetoric

(emphasis added).

Arkin no longer . . . a public figure and the publication of the opinion in the article does not constitute invasion of privacy."

Maryland recognized false light invasion of privacy as an actionable tort, Allen v. Bethlehem Steel Corp., 76 Md. App. 642, 648, cert. denied sub non, Green and Vernon Green Ass'n v. Allen, 314 Md. 458 (1988), consistent with Restatement (Second) of Torts, § 652E (1977). Section 652E provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the

> falsity of the publicized matter and the false light in which the other would be placed.

For there to be liability under § 652E, as with defamation, the statement publicized must give a false impression, although the statement does not have to be defamatory in order for liability to attach under § 652E. § 652E, comment b. As Maryland courts have

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recognized, however, the two actions are closely related, and the same considerations and legal standards govern both. Phillips, supra, 58 Md. App. at 36 n.1 (citing Harish v. Herald-Mail Co., 264 Md. 326 (1972); Bilney v. Evening Star Newspaper Co. 43 Md. App. 560 (1979)); see also, Cibenko v. Worth Publishers, Inc., 510 F.Supp. 761, 766 (D. N.J. 1981); Fogel v. Forges, 500 F. Supp. 1081, 1088 (E.D. Pa.

1980); Rinsley v. Brandt, 446 F. Supp. 850, 854 (D. Kans. 1977).

It is a question of law as to whether the statements, in the context of the publication, place the plaintiff in a "false light" that is "highly offensive" to a reasonable person. Cibenko, supra, 510 F. Supp. at 766; Fogel, supra, 500 F. Supp. at 1088; see also, Hollander v. Lubow, 277 Md. 47, 57 (1976) ("reasonableness under the facts presented is the determining factor" with respect to whether these considerations are met in an invasion of privacy case); Beane v. McMullen, 265 Md. 585, 600-601 (1972) (same); Klipa v. Bd. of Educ. of Anne Arundel County, 54 Md. App. 644, 656 (1983) (same).

Arkin attaches the same meaning to the statements in his false light counts as he does in the defamation counts. For the same reasons set forth in our review of the dismissal of the defamation counts, the statements do not place Arkin in a false light that is highly offensive

to a reasonable person. Thus, the trial court did not err in dismissing counts II, IV, and VI.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

[unnumbered page]

APPENDIX

I am confidant [sic] Arkin's complaints portend little risk to ARC

Steve Fisher

The two-cylinder engine of my IBM flintlock series personal computer had barely ceased roaring in my ears at the conclusion of my last column when I received in hand a missive from the Rockville Board of Elections Supervisors.

Apparently, someone by the name of Richard Arkin, using the return address of an unoccupied house in the West End of Rockville, made two attempts to file a formal complaint against the Alliance of Rockville Citizens for having failed his self-designed litmus test for civic responsibility.

Mr. Arkin, a year-long resident of Gaithersburg, is believed to have filed and stood for Rockville City Council last month as a slate of one.

Running mostly under pretense and without the support of a properly constituted election committee, Mr. Arkin nevertheless won the ringing endorsement of his personally organized citizen group of one known as ASS, or Arkin Seems Sensible.

Solemnly resolving that the citizens of Rockville deserved to have a council candidate against which any other candidate for city office could be made to look good, Mr. Arkin made the most of his pledge.

On Nov. 7, the citizens of Rockville reacted favorably to Mr. Arkin's offer of self-sacrifice and delivered him of the lowest individual vote count of all the candidate for Rockville city council.

Buoyed by that crushing defeat, Mr. Arkin has recently offered his services, unsolicited, to the Rockville City Board of Elections Supervisors as private counsel and chief interpreter of city election law.

To that end, and in keeping with his unbiased and charitable nature, Mr. Arkin has busied himself at his typewriter in recent weeks composing one of more reasoned opinions in support of the proposition that the death penalty is not too much to ask for those who make him cross.

His first filing was against the Team for Rockville '89. Mr. Arkin took great umbrage at the fact that the slate he was running against failed to endorse his candidacy on their sample ballot.

On Dec. 1, Mr. Arkin composed an eight-page, single-spaced, typed, footnoted, and meticulously punctuated letter to the Rockville Board of Elections Supervisors recommending that the Alliance of Rockville Citizens be drawn and quartered. For good measure, Mr. Arkin provided four pages of attachments to his letter.

The City of Rockville received his letter ten days after it was written. Two weeks after having written his first letter, Mr. Arkin sent the Board of Elections a second letter, this one composed of nine pages of single-spaced, typed, footnoted, and meticulously punctuated text upon which he wrote "Amended complaint (replaces complaint dated December 1, 1989)." It was received by the City of Rockville on Dec. 18.

I received copies of both Mr. Arkin's letters on Dec. 21 at a cost to the taxpayers of Rockville of $1.05 in postage and approximately $2.50 in photocopying expenses.

Having read both, I would not hesitate to say that either dissertation would qualify Mr.

Arkin for a doctorate in political quackery. Through such authoritative evidence as might be gleaned from a reading of my columns, which Mr. Arkin has previously dismissed as infantile babbling, he presents a case of conjecture in which all manner of convoluted reasoning and tortured logic are used to form a funeral pyre upon which he believes he has staked ARC, and to which he now asks the Board of Elections to kindly lend their torch.

Though I am confidant [sic] at this point that Mr. Arkin's scattering of small tinder about a ropeless stake portends little serious risk to ARC or the Team of Rockville '89, I do wonder when the spark of all consuming hatred which imbues Mr. Arkin's soul and which he so carelessly strikes in the presence of his perceived enemies might well find fuel in the flatulence of his own rhetoric.

Perhaps Mr. Arkin has forgotten that it is unwise for childish people to play with matches.

OPINION AT HEARING ON MOTION
TO DISMISS, OR IN THE ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY,
MARYLAND

RICHARD L. ARKIN	:	
	:	
PLAINTIFF	:	
	:	
v.	:	CIVIL NO. 69410
	:	
GAITHERSBURG PUBLISHING COMPANY, INC., et. al.	:	
	:	
DEFENDANTS	:	

Rockville, Maryland

July 8, 1991

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE WILLIAM M. CAVE, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

MICHAEL T. BENSON, Esq.
2703 Waco Court
Baltimore, Maryland 21209

FOR THE DEFENDANTS:

HENRY R. ABRAMS, Esq.
100 South Charles Street, 14th Floor
Baltimore, Maryland 21201

(p. 19) THE COURT: Well this is one in which it appears that you are going to have -- need only have one trial.

I will grant the motion to dismiss, grant judgment to the Defendant on all counts. Re-reading the article, reading all of the Supreme Court decisions, to the person who is reading this article, opinion or fact -- and it is difficult to ascertain what facts Mr. Fisher is stating -- it clearly is hyperbole, rhetorical hyperbole.

At the risk of fueling the flames, if you will, I was going to say if he can't stay in the heat, stay out of the kitchen, of the political kitchen.

I don't particularly in any manner applaud Mr. Fisher, but it just isn't going to amount to defamation and, in my opinion, it ought to stop here before everyone spends a lot of money, unless you can, as they so often do, have the Appellate Courts disagree with that.

I will grant judgment on all counts and that disposes of all issues on this trial and makes it final and appealable.

MR. BENSON: Your honor, one question. Could you make a comment on invasion of privacy because, even if the defamation counts are dismissed, that doesn't provide reason for dismissing the invasion of privacy claims.

THE COURT: Well, I am not sure --

MR. BENSON: I had stated it in my opposition.

(p. 20) THE COURT: The fact that the election had been over for some 50 days doesn't make him no longer a political figure -- excuse me -- a public figure and the publication of the opinion in the article does not constitute invasion of privacy. I will grant judgment on those counts, also.

ORDER DENYING PLAINTIFF'S MOTION
TO ALTER OR AMEND A JUDGMENT

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

RICHARD L. ARKIN	:	
	:	
PLAINTIFF	:	
	:	
v.	:	CIVIL NO. 69410
	:	
GAITHERSBURG PUBLISHING COMPANY, INC., et. al.	:	
	:	
DEFENDANTS	:	

ORDER

The Court has considered Plaintiff's Motion to Alter or Amend a Judgment and opposition thereto and is of the opinion that no further hearing is necessary.

Accordingly, it is this 26th day of August, 1991, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Plaintiff's Motion to Alter or amend a Judgment is DENIED.

/S/

WILLIAM M. CAVE, JUDGE

FILED
AUG 27 1991
Clerk of the Circuit Court
Montgomery County, Md.

OPINION AT HEARING ON MOTION TO DISMISS

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

RICHARD L. ARKIN	:	
	:	
PLAINTIFF	:	
	:	
v.	:	CIVIL NO. 69410
	:	
GAITHERSBURG PUBLISHING COMPANY, INC., et. al.	:	
	:	
DEFENDANTS	:	

Rockville, Maryland

April 3, 1991

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE WILLIAM M. CAVE, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

MICHAEL T. BENSON, Esq.
2703 Waco Court
Baltimore, Maryland 21209

FOR THE DEFENDANTS:

HENRY R. ABRAMS, Esq.
100 South Charles Street, 14th Floor
Baltimore, Maryland 21201

(p. 17): THE COURT: Counsel, frankly, I still don't understand the opinions of the Appellate

Courts on when a motion to dismiss is appropriate, when it is a motion for summary judgment. Since they can't reconcile their own opinions, it makes it difficult for me to reconcile their own (p. 18) opinions.

I will deny the motion to dismiss subject to filing a motion for summary judgment, which I suspect you may well be very successful on, but taking -- ignoring any recitation that you make and directing only as to what is stated with the inferences that they suggest be drawn, the motion to dismiss may be inappropriate.

* * * * * * *

(p. 20) THE COURT: It appears that somebody -- it looks like the Courts keep waffling along on the First Amendment on where you go and what the --

MR. ABRAMS: I suspect that our Court is a little stronger than the big Court.

THE COURT: Well, in my opinion --

MR. ABRAMS: It has been disappointing, really.

THE COURT: -- that if they had an opportunity to revisit Emery, they may have come out with a different decision. Indeed, if -- I shouldn't say that; it could be taken out of context, but I think that the case would be -- well, that is (p. 21) not to say the decision was racially motivated --

MR. ABRAMS: No.

THE COURT: -- but factually that --

MR. ABRAMS: It was forged in a crucible of fire.

THE COURT: Yes. Well, come on back again with other motions and things and you will have a good time with this.

MARYLAND COURT OF APPEALS ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RICHARD L. ARKIN	*	In the
	*	Court of Appeals
v.	*	of Maryland
GAITHERSBURG PUBLISHING COMPANY, INC., et al.	*	Petition Docket No. 340
	*	September Term, 1992 (No. 1648, September Term, 1991, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: October 23, 1992

COMPLAINT, COUNTS I THROUGH VI

RICHARD L. ARKIN	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
GAITHERSBURG PUBLISHING COMPANY, INC., et al.	*	MONTGOMERY COUNTY, MARYLAND
Defendants	*	CIVIL Case No.: 69410

* * * * * * * * * * * * *

COMPLAINT and DEMAND FOR JURY TRIAL

Richard L. Arkin, Plaintiff, by his attorney Michael T. Benson sues Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette, and Stephen H. Fisher, and alleges:

FACTS APPLICABLE TO ALL COUNTS

1. At all times material hereto, The Rockville Gazette, a newspaper published widely in the City of Rockville and its neighboring areas in Montgomery County, MD did business under the ownership and control of Gaithersburg Publishing Co., Inc., a Maryland corporation, and had an office in Rockville, MD; Stephen H. Fisher was employed by The Rockville Gazette as a columnist

or journalist; and Richard L. Arkin had run unsuccessfully for a seat on the Rockville City Council and lived in Gaithersburg, MD.

2. In the December 27, 1989 edition of The Rockville Gazette Stephen H. Fisher authored an article (hereinafter, article in suit) (copy attached hereto and marked as Exhibit 1) read by numerous persons in the Rockville area community, containing a series of false, misleading, and derogatory misstatements of fact enumerated below in separate Counts, and the Defendants breached their duty to Plaintiff by not contacting him prior to publishing the article in suit to obtain his version of those misstatements.

COUNT I

1. Part of the article in suit states

"---someone by the name of Richard Arkin, using the return address of an unoccupied house in the West End of Rockville, made two attempts to file a formal complaint against the Alliance of Rockville Citizens for having failed his self-designed litmus test for civic responsibility."

"Mr. Arkin, a year-long resident of Gaithersburg, is believed to have filed and stood for Rockville City Council last month as a slate of one."

2. Defendants knew that the Arkin Rockville residence was heavily damaged by a major fire in late 1988 rendering the Arkin house uninhabitable, that the Arkin family lived in temporary quarters while their home was being rebuilt, that the Arkin family maintained its legal residence for all purposes in Rockville, and failed to so report in the article in suit.

3. The part of the article in suit quoted in this Count makes it appear that the Arkin family moved away from Rockville to Gaithersburg, and that Plaintiff violated Rockville election laws by running for a City of Rockville public office while residing outside of that city.

4. Defendants knew that Plaintiff successfully filed (rather than merely attempted to file) complaints against the Alliance of Rockville Citizens (ARC) because (1) ARC failed to register as a political committee and (2) ARC failed to file required reports with the City of Rockville (not because Plaintiff felt that ARC failed his "self-designed litmus test" for civic

responsibility); Defendants knew that those complaints were processed by the Board of Supervisors of Elections, and Defendants knew that the quoted part of the article in suit in this Count was false.

5. As a result of the aforementioned false, misleading, and derogatory statements about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT II

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 5 of Count I.

2. The publication of the aforementioned article quoted in Count I made Plaintiff appear to be a criminal, dishonest, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who

were once his friends, and has suffered emotional distress.

WHEREFORE, Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Co., Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000) in damages, and in the amount of five million dollars ($5,000,000) in punitive damages, and the costs of this action.

COUNT III

1. Part of the article in suit also states "Perhaps Mr. Arkin has forgotten that it is unwise for childish people to play with matches."

2. Defendants knew that the quoted part of the article in suit in this Count in context of discussing his use of a return address of an unoccupied house in the West End of Rockville makes it falsely appear (to those persons who knew of his house being damaged by fire) that fire to the Arkin residence resulted from an act of arson committed by Plaintiff.

3. As a result of the aforementioned false, misleading, and derogatory statements about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT IV

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 3 of Count III.

WHEREFORE, Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and costs of this action.

COUNT V

1. Part of the article in suit states

"Running mostly under pretense and without the support of a properly constituted election committee, Mr. Arkin, nevertheless won the ringing endorsement of his personally organized citizen group of one known as ASS, or Arkin Seems Sensible."

2. Defendants knew that the quoted part of the article in suit in this Count was false and attributed to Plaintiff a criminal violation of the City of Rockville Election laws because Plaintiff's election committee was properly constituted pursuant to requirements of the City of Rockville Elections Ordinance, and Defendants

2. The publication of the aforementioned article quoted in Count III made Plaintiff appear to be an arsonist criminal, dishonest, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

knew that there was no citizen group known as ASS or Arkin Seems Sensible because from the tone of the article in suit, Defendants wanted to publicly label Plaintiff as an "ass."

3. As a result of the aforementioned false, misleading, and derogatory statements about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT VI

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 3 of Count V.

2. The publication of the aforementioned article quoted in Count V made Plaintiff appear to be a dishonest criminal and a low-life individual, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the community,

loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) punitive damages, and costs of this action.

SUPREME COURT, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

No. 92-1255

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RICHARD L. ARKIN,
Petitioner

v.

GAITHERSBURG PUBLISHING COMPANY, INC. and
STEPHEN H. FISHER,
Respondents

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland

---

BRIEF IN OPPOSITION

HENRY R. ABRAMS
(Counsel of Record)
THEODORE SHERBOW
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100 South Charles Street
Baltimore, Maryland 21201
(410) 332-8600
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the decision of the Court of Special Appeals of Maryland conflicts with a prior decision of that court and with Maryland law generally governing the trial court's threshold determination of whether, as a matter of law, a statement is defamatory or creates an actionable false impression?

LIST OF PARTIES

Respondents adopt the List of Parties set out by the Petitioner.*

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* Respondent Gaithersburg Publishing Company, Inc. is a substantially owned subsidiary of The Gaithersburg Gazette, Inc., which is in turn a wholly owned subsidiary of The Washington Post Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1255

RICHARD L. ARKIN,

Petitioner

v.

GAITHERSBURG PUBLISHING COMPANY, INC. and STEPHEN H. FISHER,

Respondents

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland

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BRIEF IN OPPOSITION

JURISDICTION

Petitioner seeks review of the judgment of a state court, invoking jurisdiction pursuant to 28 U.S.C. § 1257. However, the Petition for Writ of Certiorari (the "Petition") presents no federal question giving this Court jurisdiction. Petitioner merely challenges the application by the Court of Special Appeals of Maryland (the "Court of Special Appeals") of concededly applicable state law principles governing the trial judge's role in determining whether particular statements are capable of bearing the defamatory meaning or false impression alleged.[1]

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[1] In setting out the question presented, Petitioner makes passing reference to the First Amendment, but clearly *not* as the basis for review. As stated, the question presented is whether certain statements defamed him or invaded his privacy in "contravention" of the First Amendment. This effort to create a First Amendment

STATEMENT OF RULES

In addition to certain of the provisions cited by Petitioner, Md. Rule 8-114(a) and (b) is pertinent to this Court's review. The full text of that Rule is set out in Respondents' Appendix at 1a (hereafter "R.A. ——").

STATEMENT OF THE CASE

Petitioner's Statement of the Case evidences a fundamental misapprehension of the actions of the courts below and of the principles and cases upon which they were based. Moreover, the Petitioner has failed to fairly and clearly articulate the separate and independent bases underlying those actions.

In 1989, Petitioner Richard L. Arkin ("Arkin") unsuccessfully sought election to the Rockville, Maryland City Council. Less than one month after his defeat in the November general election, Arkin filed a series of complaints with the Rockville Board of Elections Supervisors, contending that a rival political organization, the Alliance of Rockville Citizens, had committed certain violations of law in connection with the election.

Shortly after Arkin's complaints were filed, Arkin's own campaign for public office, his political organization and his election-related complaints were the subject of a political commentary (the "Article") authored by Respondent Stephen H. Fisher ("Fisher"). The Article, entitled "I Am Confidant [sic] Arkin's Complaints Portend Little Risk to ARC," appeared in the December 27, 1989 edition of the *Rockville Gazette*, under a large print

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issue is unavailing. The First Amendment does not prohibit defamation or invasion of privacy. The existence and contours of these torts, as long as not applied in an overbroad manner to punish speech protected by the First Amendment, are strictly matters of state law. *See, e.g., Masson v. New Yorker Magazine*, —— U.S. ——, 111 S.Ct. 2419, 2436 (1991) ("whether a statement is defamatory is a question of [state] law"); *Gertz v. Welch*, 418 U.S. 323, 341 (1974).

banner titled "OPINION." The *Rockville Gazette* is published by Respondent Gaithersburg Publishing Company, Inc. ("Gaithersburg Publishing").

On December 26, 1990, Arkin filed a twelve-count complaint against Fisher and Gaithersburg Publishing in the Circuit Court for Montgomery County, Maryland. The complaint alleged six counts of defamation arising from statements in the Article and six corresponding counts claiming that the same statements constituted invasion of privacy by placing Arkin in a false light.[2]

Respondents filed a motion to dismiss the complaint for its failure, as a matter of law, to state any claim upon which relief could be granted. Contrary to Arkin's claims in the Petition, the motion was founded upon two independent grounds.

Respondents argued that Arkin's claims for defamation and invasion of privacy, as pleaded, did not satisfy the elements of these state law torts. Respondents also contended, as a separate and independent basis for their motion, that the statements in question constituted rhetorical hyperbole shielded from challenge by the First Amendment to the United States Constitution.

On July 8, 1991, the circuit court dismissed the complaint for failure to state a claim upon which relief could be granted. The circuit court thereafter denied Arkin's motion to alter or amend the judgment, and Arkin noted a timely appeal to the Court of Special Appeals.[3]

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[2] Because Arkin only provided portions of the complaint in his Appendix, Respondents have reproduced the complaint in its entirety. (R.A. 2a-17a).

[3] Prior to the dismissal by the circuit court, Arkin voluntarily dismissed Counts IX through XII of the complaint, containing two claims for defamation and two corresponding claims for invasion of privacy. Thereafter, Arkin did not appeal the judgment of the circuit court as to Counts VII and VIII, leaving only Counts I through VI for review by the Court of Special Appeals.

On June 16, 1992, the Court of Special Appeals affirmed the judgment of the circuit court in an unpublished, *per curiam* decision. The Court of Special Appeals affirmed the judgment on *both* of the grounds raised by Respondents in the circuit court. Relying upon Maryland law granting the court the right to determine, as a threshold matter, whether statements are reasonably capable of the defamatory meaning alleged, and reciting Maryland's definition of a defamatory statement and Maryland's pleading requirements pertinent to defamation claims, the court held that, as a matter of state law, none of the statements was reasonably capable of conveying the defamatory meaning alleged. (See the Opinion of the Court of Special Appeals, reprinted in Petitioner's Appendix, at 1A-29A. Hereafter, citation to materials in Petitioner's Appendix shall be "P.A. ——.")

Independent of this state law basis, the Court of Special Appeals also held as a matter of law that each of the statements in question constituted rhetorical hyperbole. Thus, under the First Amendment, they could not serve as the basis for Arkin's defamation claims. (P.A. 23A)

The Court of Special Appeals then disposed of each of Arkin's claims for invasion of privacy. As stated by the Court of Special Appeals, in Maryland, invasion of privacy and defamation claims "are closely related, and the same considerations and legal standards govern both." (P.A. 23A) Accordingly, Arkin's claims of invasion of privacy failed to state a claim for relief as a result of the same flaws underlying his defamation claims. (P.A. 21A-25A)

Arkin then filed a Petition for Writ of Certiorari with the Court of Appeals of Maryland, the State's highest court. On October 23, 1992, the Court of Appeals of Maryland denied that petition, stating that review by certiorari was neither desirable nor in the public interest. (P.A. 37A)

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT RAISE ANY SUBSTANTIAL FEDERAL QUESTION NOR DOES IT MEET ANY OF THE OTHER CRITERIA JUSTIFYING THIS COURT'S REVIEW.

Arkin's Petition evidences a fundamental misapprehension of the bases upon which this Court will grant a Writ of Certiorari. Arkin cites two grounds in support of his Petition. First, Arkin claims that the decision of the Court of Special Appeals conflicts with that reached in *Embrey v. Holly*, 48 Md. App. 571, 429 A.2d 251 (1981), *aff'd in part, rev'd in part*, 293 Md. 128, 442 A.2d 966 (1982), a prior decision of the same court. (P.A. 13A) Second, citing *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992), Arkin claims that the decision conflicts with a "customary requirement" of Maryland law. (P.A. 16A) Each of these cases, so far as is relevant here, deals with the state procedural issue of the court's authority in determining whether statements are reasonably capable of conveying the defamatory meaning alleged.

Thus, as a threshold matter, nowhere in Arkin's petition has he identified any conflict between the decision of the Court of Special Appeals and a decision of another state court of last resort or a decision of this Court. Moreover, Arkin has not articulated any unresolved question of federal law requiring resolution by this Court. Sup. Ct. R. 10, Fed. Civ. Jud. and Proc. (1991). Arkin simply contends that a conflict exists between two decisions of the Court of Special Appeals and between the decision here at issue and an alleged customary requirement of Maryland law. Intrastate conflicts or questions of state law are not properly reviewable by this Court. *Davis v. United States*, 417 U.S. 333, 340 (1974).

Further, Arkin has not identified any special or important consideration justifying review in this case.

Arkin does not claim any controversy as to the existence of the legal principles upon which the Court of Special Appeals relied. Arkin does not dispute the constitutionality of Maryland's defamation and invasion of privacy law, nor does he challenge the constitutional principles relied upon by the court in its discussion of the doctrine of rhetorical hyperbole. Nor, indeed, does Arkin assert that, as a matter of law, the alleged statements were defamatory or created a false impression. Rather, Arkin merely contends that, under Maryland law, the issue of defamatory content and false impression should have been submitted to the jury. According to Arkin, the Maryland courts misapplied the Maryland procedural law governing this issue to the facts in this case. This Court's review, however, "is discretionary and depends on numerous factors *other* than the perceived correctness of the judgment" below. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974) ("this court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied.") Accordingly, because Arkin has not cited any such factors, the Petition is utterly devoid of reviewable substance.[4]

The most serious flaw underlying Arkin's Petition, however, is that each of the reasons presented as justifying review concerns a matter purely of state law. Arkin cites two decisions in support of his contention that the Court of Special Appeals erred in ruling upon his allegations as a matter of law. Those decisions are *Embrey v. Holly*, 48 Md. App. 571, 429 A.2d 251 (1981) *aff'd in part, rev'd in part*, 293 Md. 128, 422 A.2d 966

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[4] Arkin fails to point out that the unreported, *per curiam* decision of the Court of Special Appeals "is neither precedent within the rule of stare decisis nor persuasive authority," and may not be cited for any purpose in unrelated cases. Md. Rule 8-114(a) and (b). Thus, the decision of the Court of Special Appeals does not establish *any* substantial or important legal principle; its impact is limited solely to the parties involved.

(1982); and *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992). Both of these cases, however, make clear that, as stated in *Batson*, "the threshold question of whether a publication is defamatory. . . . is for the court upon reviewing the statement as a whole. . . ." *Batson*, 325 Md. at 723; 602 A.2d at 1210; *see also Embrey*, 48 Md. App. at 581, 429 A.2d at 259. Both cases also make clear that this standard, and its application, is strictly a matter of state law. No federal statutory or constitutional considerations require or oppose this state rule of procedure. Thus, because no federal question is raised, review by this Court is not warranted.

II. THE DECISION OF THE COURT OF SPECIAL APPEALS IS BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Petition fails to explain that the decision of the Court of Special Appeals was based on two separate, independent and adequate legal grounds. Arkin focuses his review upon the holding by both the circuit court and the Court of Special Appeals that the challenged statements constituted rhetorical hyperbole shielded by the First Amendment. Arkin ignores the entirely separate and independent holding of the Court of Special Appeals that, as alleged, Arkin's claims did not satisfy the elements and pleading requirements of the torts of defamation and invasion of privacy as defined by state law.[5] It has long been held by this Court:

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[5] As previously stated, defamation and false light invasion of privacy actions are governed solely by state law as long as these torts are not applied so broadly as to infringe upon speech protected by the First Amendment. *Masson v. New Yorker Magazine*, —— U.S. ——, 111 S.Ct. 2419, 2436 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Gertz v. Welch*, 418 U.S. 323, 347 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). These torts exist to further a state's legitimate interest in protecting its citizens from harm caused by defamatory statements. *Gertz*, 418 U.S. at 341. In contrast, the doctrine of rhetorical

> "Where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [this Court's] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."
>
> * * * *
>
> "The jurisdictional concern is that we not render an advisory opinion, and if the same judgment will be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Michigan v. Long, 463 U.S. 1032, 1038 n.4, 1042 (1983), (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) and *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)); *see also*, *Colorado v. Nunez*, 465 U.S. 324, 327 (1984); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). There can be no doubt that the decision of the Court of Special Appeals is based upon an independent and adequate state ground, rendering review inappropriate.

As set forth by the Court of Special Appeals, to allege a claim for defamation in Maryland, a person must plead, *inter alia*: (1) an allegedly defamatory statement that exposes the plaintiff to public scorn, hatred or ridicule; (2) falsity; (3) the requisite degree of fault; and (4) injury caused by the statement. (P.A. 6A) If the statement is defamatory on its face—that is, if the words themselves directly state the defamatory allegation—it is actionable *per se*, without further pleading. If, on the other hand, its defamatory meaning depends on facts or matters outside the statement (defamation *per quod*), those facts or matters, together with the reasonable un-

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hyperbole protects certain forms of speech from being actionable. Thus, provided it is not claimed that state defamation law infringes upon the guarantees of the First Amendment—and Arkin makes no such claim—the separate tests applied by the Court of Special Appeals serve different purposes, operate independently of each other, and are free from entanglement.

derstanding of third parties, must be specifically alleged. (P.A. 6A, 14A)

The Court of Special Appeals found that Counts I, III and V of Arkin's Complaint warranted dismissal because, in each instance, Arkin's allegations failed to satisfy one or more of the elements required by state law. Thus, the Court of Special Appeals found the dismissal of Arkin's defamation claims justified on the grounds that certain of the challenged statements were not defamatory *per se*, and that Arkin failed, under Maryland pleading requirements, to plead sufficient extrinsic facts to support claims for defamation *per quod*. Further, the Court of Special Appeals held that certain of the statements at issue, even if construed as assertions of fact, were non-actionable because true. (P.A. 11A-21A)

Addressing Arkin's false light invasion of privacy claims, the Court of Special Appeals held that, under Maryland law, dismissal of these claims was also proper. It cited several cases for the proposition that, in Maryland, defamation and false light invasion of privacy actions "are closely related and the same considerations and legal standards govern both." (P.A. 23A, citing, *inter alia*, *Phillips v. Washington Magazine, Inc.*, 58 Md. App. 30, 36 n.1, 472 A.2d 98, *cert. denied*, 300 Md. 89, 475 A.2d 1201 (1984)) Consequently, because Arkin attached the same meanings to the challenged statements in his false light counts as he did in the defamation counts, the Court of Special Appeals held that the false light counts were defective for *each* of the reasons set forth in the Court's review of the defamation claims. (P.A. 24A-25A)

Thus, as made clear by the opinion of the Court of Special Appeals, application of the pleading and substantive requirements of Maryland's state defamation and invasion of privacy law and standards served as an independent and adequate ground for the decision below. Accordingly, review of this case is inappropriate.

III. THE DECISION OF THE COURT OF SPECIAL APPEALS WAS CORRECT.

Arkin has failed to cite a single case applying Maryland law to analogous facts in support of his contention that the Court of Special Appeals erred in its application of that law. Instead, Arkin places his principal reliance upon the prior decision of the Court of Special Appeals in *Embrey*, 48 Md. App. 571, 429 A.2d 251 (1981), *aff'd in part, rev'd in part*, 293 Md. 128, 422 A.2d 966 (1982), and in three federal decisions, none of which involves the application of Maryland law. The facts at issue in *Embrey* are not in any way analagous to those here in dispute.[6] Moreover, none of the three federal decisions is in any way apposite to this case. Those cases are *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987); and *Afro-American Publishing Co. v. Jaffe*, 336 F.2d 649 (D.C. Cir. 1966). Arkin cites these cases for the alleged proposition that truthful statements are not shielded from claims of defamation and false light invasion of privacy. Contrary to Arkin's contention, these cases merely hold that a publication consisting of *both* true and false statements may be actionable as to the portion found false. *Harte-Hanks*, 491 U.S. at 692; *Tavoulareas*, 817 F.2d at 787-788; *Afro-American*, 336 F.2d at 655. In the present case, however, nothing was false or defamatory as alleged. The Court of Special Appeals separately analyzed each of the statements in question and, relying upon ample Maryland law, prop-

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[6] That case held that the humorously intended statements there at issue were reasonably capable of a defamatory meaning because they were contained in a radio broadcast delivered as straight news, where certain listeners may not have heard those segments indicating the broadcast was intended in jest. This action, on the other hand, involves the print media and an article which appeared under the print banner "Opinion." There was no allegation, as in *Embrey*, that readers did not read the Article as a whole. Further, the Article's intention was not concealed within a straight news format.

erly concluded that the statements or imputations claimed either were not made as alleged or were true.

The Court of Special Appeals' disposition of the rhetorical hyperbole claims was equally well supported. Arkin again fails to cite a single case dealing with analagous facts which reached a decision contrary to that granted by the Court of Special Appeals. Applying well developed principles and a plethora of cases dealing with analogous allegations, the Court of Special Appeals properly concluded that the statements in question, read in the context of the Article as a whole, were marked by precisely the "sort of loose, figurative or hyperbolic language which would negate the impression" that the Article was stating objective facts about Arkin. (P.A. 4A, quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 7 (1990)). Looking at the challenged statements, it is clear that they were "used in the context of a political skirmish [and] . . . could not have been believed to convey objective fact." *Blouin v. Anton*, 139 Vt. 618, 431 A.2d 489, 490-91 (Vt. 1981).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

RULE 8-114. UNREPORTED OPINIONS

(a) Not Authority.—An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.

(b) Citation.—An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority. In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported opinion shall attach a copy of it to the pleading, brief, or paper in which it is cited.

APPENDIX B

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil Case No.: 69410 filed 12-26-90

RICHARD L. ARKIN
522 West Deer Park Road
Gaithersburg, Maryland 20877
Plaintiff

v.

GAITHERSBURG PUBLISHING COMPANY, INC. doing business as The Rockville Gazette, 250 Hungerford Drive, Rockville, Maryland 20850

and

STEPHEN H. FISHER
1014 Neal Drive
Rockville, Maryland 20850
Defendants

COMPLAINT and DEMAND FOR JURY TRIAL

[Filed December 26, 1990]

Richard L. Arkin, Plaintiff, by his attorney Michael T. Benson sues Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette, and Stephen H. Fisher, and alleges:

FACTS APPLICABLE TO ALL COUNTS

1. At all times material hereto, The Rockville Gazette, a newspaper published widely in the City of Rockville and its neighboring areas in Montgomery County, MD

did business under the ownership and control of Gaithersburg Publishing Co., Inc., a Maryland corporation, and had an office in Rockville, MD; Stephen H. Fisher was employed by The Rockville Gazette as a columnist or journalist; and Richard L. Arkin had run unsuccessfully for a seat on the Rockville City Council and lived in Gaithersburg, MD.

2. In the December 27, 1989 edition of The Rockville Gazette Stephen H. Fisher authored an article (hereinafter, article in suit) (copy attached hereto and marked as Exhibit 1) read by numerous persons in the Rockville area community, containing a series of false, misleading, and derogatory misstatements of fact, and the Defendants breached their duty to Plaintiff by not contacting him prior to publishing the article in suit to obtain his version of those misstatements.

COUNT I

1. Part of the article in suit states

> "—someone by the name of Richard Arkin, using the return address of an unoccupied house in the West End of Rockville, made two attempts to file a formal complaint against the Alliance of Rockville Citizens for having failed his self-designed litmus test for civic responsibility."
>
> "Mr. Arkin, a year-long resident of Gaithersburg, is believed to have filed and stood for Rockville City Council last month as a slate of one."

2. Defendants knew that the Arkin Rockville residence was heavily damaged by a major fire in late 1988 rendering the Arkin house uninhabitable, that the Arkin family lived in temporary quarters while their home was being rebuilt, that the Arkin family maintained its legal residence for all purposes in Rockville, and failed to so report in the article in suit.

3. The part of the article in suit quoted in this Count makes it appear that the Arkin family moved away from Rockville to Gaithersburg, and that Plaintiff violated Rockville election laws by running for a City of Rockville public office while residing outside of that city.

4. Defendants knew that Plaintiff successfully filed (rather than merely attempted to file) complaints against the Alliance of Rockville Citizens (ARC) because (1) ARC failed to register as a political committee and (2) ARC failed to file required reports with the City of Rockville (not because Plaintiff felt that ARC failed his "self-designed litmus test" for civic responsibility); Defendants knew that those complaints were processed by the Board of Supervisors of Elections, and Defendants knew that the quoted part of the article in suit in this Count was false.

5. As a result of the aforementioned false, misleading, and derogatory statements about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT II

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 5 of Count I.

2. The publication of the aforementioned article quoted in Count I made Plaintiff appear to be a criminal, dishonest, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Co., Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000) in damages, and in the amount of five million dollars ($5,000,000) in punitive damages, and the costs of this action.

COUNT III

1. Part of the article in suit also states

> "Perhaps Mr. Arkin has forgotten that it is unwise for childish people to play with matches."

2. Defendants knew that the quoted part of the article in suit in this Count in context of discussing his use of a return address of an unoccupied house in the West End of Rockville makes it falsely appear (to those persons who knew of his house being damaged by fire) that fire to the Arkin residence resulted from an act of arson committed by Plaintiff.

3. As a result of the aforementioned false, misleading, and derogatory statements about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville

area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT IV

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 3 of Count III.

2. The publication of the aforementioned article quoted in Count III made Plaintiff appear to be an arsonist criminal, dishonest, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars

($5,000,000.00) in punitive damages, and costs of this action.

COUNT V

1. Part of the article in suit states

> "Running mostly under pretense and without the support of a properly constituted election committee, Mr. Arkin, nevertheless won the ringing endorsement of his personally organized citizen group of one known as ASS, or Arkin Seems Sensible."

2. Defendants knew that the quoted part of the article in suit in this Count was false and attributed to Plaintiff a criminal violation of the City of Rockville Election laws because Plaintiff's election committee was properly constituted pursuant to requirements of the City of Rockville Elections Ordinance, and Defendants knew that there was no citizen group known as ASS or Arkin Seems Sensible because from the tone of the article in suit, Defendants wanted to publicly label Plaintiff as an "ass."

3. As a result of the aforementioned false, misleading, and derogatory statements about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT VI

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 3 of Count V.

2. The publication of the aforementioned article quoted in Count V made Plaintiff appear to be a dishonest criminal and a low-life individual, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light. Plaintiff has suffered humiliation, loss of reputation of his good name in the community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) punitive damages, and costs of this action.

COUNT VII

1. Part of the article in suit states

> "—— and in keeping with his unbiased and charitable nature, Mr. Arkin has busied himself at his typewriter in recent weeks composing one or more reasoned opinions in support of the proposition that the death penalty is not to (sic) much to ask for those who make him cross."

2. Plaintiff never wrote an opinion on the death penalty attributed to him in the part of the article in suit quoted in this Count and Defendants had no information

that he did; by describing Plaintiff as unibased and charitable while having written an opinion in favor of the death penalty (which he did not) under the circumstances described in the portion of the article in suit quoted in this Count, Plaintiff is portrayed ironically as a person with opposing personality characteristics and with a personality disorder.

3. As a result of the aforementioned false, misleading, and derogatory statements about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT VIII

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 3 of Count VII.

2. The publication of the aforementioned article quoted in Count VII made Plaintiff appear to be abnormal psychologically and dishonest, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars $(500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and costs of this action.

COUNT IX

1. Part of the article in suit states

> "His first filing was against the Team for Rockville '89. Mr. Arkin took great umbrage at the fact that the slate he was running against failed to endorse his candidacy on their sample ballot."

2. The portion of the article in suit quoted in this Count implies that Plaintiff sought endorsement of the Team for Rockville '89 slate; that implication is false because Plaintiff never sought the endorsement of that slate and Defendants had no information that he did seek the aforementioned endorsement.

3. As a result of the aforementioned false and misleading statement about Plaintiff published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount

of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT X

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 3 of Count IX.

2. The publication of the aforementioned article quoted in Count IX made Plaintiff appear to be dishonest in his political business dealings by implying that he sought endorsement of the Team for Rockville '89 slate when he did not do so, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000) in damages, and in the amount of five million dollars ($5 000,000) in punitive damages, and costs of this action.

COUNT XI

1. Part of the article in suit states

> "On Dec. 1, Mr. Arkin composed an eight-page, single-spaced, typed, footnoted, and meticulously punctuated letter to the Rockville Board of Elections Supervisors recommending that the Alliance of Rockville Citizens be drawn and quartered."

2. The quoted part of the article in suit in this Count is false in that Plaintiff's complaint to the Board requested that ARC be required to forfeit the penalties contemplated by law for failure to file; it did not recommend that ARC be drawn and quartered, and Defendants knew of the aforementioned falsity.

3. As a result of the aforementioned false statement about him published with reckless disregard of the truth, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and suffered emotional distress.

WHEREFORE, Plaintiff, Richard L. Arkin, demands judgment against the Defendants, Gaithersburg Publishing Company, Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000.00) in damages, and in the amount of five million dollars ($5,000,000.00) in punitive damages, and the costs of this action.

COUNT XII

1. Plaintiff restates, realleges, and incorporates by reference herein paragraph nos. 1 through 3 of Count XI.

2. The publication of the aforementioned article quoted in Count XI attributed a false statement of belief to Plaintiff, and portrayed him in a false light in the public eye.

3. The aforementioned false light was objectionable to Plaintiff and to others who were acquainted with Plaintiff, under the circumstances of the way the aforementioned part of the article in suit portrayed him.

4. By allowing the article in suit to be published as written, Defendants acted with reckless disregard of the truth by distorting it and acted with malice.

5. As a result of the aforementioned publication portraying Plaintiff in a false light, Plaintiff has suffered humiliation, loss of reputation of his good name in the Rockville area community, loss of hospitality of those who were once his friends, and has suffered emotional distress.

WHEREFORE, Richard L. Arkin, Plaintiff, demands judgment against Defendants, Gaithersburg Publishing Co., Inc. doing business as The Rockville Gazette and Stephen H. Fisher jointly and severally in the amount of five hundred thousand dollars ($500,000) in damages, and in the amount of five million dollars ($5,000,000) in punitive damages, and costs of this action.

/s/ Michael T. Benson
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2703 Waco Court
Baltimore, Maryland 21209
(301) 484-0358
Attorney for Plaintiff

EXHIBIT 1

I am confidant Arkin's complaints portend little risk to ARC

Steve Fisher

The two-cylinder engine of my IBM flintlock series personal computer had barely ceased roaring in my ears at the conclusion of my last column when I received in hand a missive from the Rockville Board of Elections Supervisors.

Apparently someone by the name of Richard Arkin, using the return address of an unoccupied house in the West End of Rockville, made two attempts to file a formal complaint against the Alliance of Rockville Citizens for having failed his self-designed litmus test for civic responsibility.

Mr. Arkin, a year-long resident of Gaithersburg, is believed to have filed and stood for Rockville City Council last month as a slate of one.

Running mostly under pretense and without the support of a properly constituted election committee. Mr. Arkin nevertheless won the ringing endorsement of his personally organized citizen group of one known as ASS, or Arkin Seems Sensible.

Solemnly resolving that the citizens of Rockville deserved to have a council candidate against which any other candidate for city office could be made to look good, Mr. Arkin made the most of his pledge.

On Nov. 7, the citizens of Rockville reacted favorably to Mr. Arkin's offer of self-sacrifice and delivered him of the lowest individual vote count of all the candidates for Rockville city council.

Buoyed by that crushing defeat, Mr. Arkin has recently offered his services, unsolicited, to the Rockville City

Board of Elections Supervisors as private counsel and chief interpreter of city election law.

To that end, and in keeping with his unbiased and charitable nature, Mr. Arkin has busied himself at his typewriter in recent weeks composing one or more reasoned opinions in support of the proposition that the death penalty is not to much to ask for those who make him cross.

His first filing was against the Team for Rockville '89. Mr. Arkin took great umbrage at the fact that the slate he was running against failed to endorse his candidacy on their sample ballot.

On Dec. 1, Mr. Arkin composed an eight-page, single-spaced, typed, footnoted, and meticulously punctuated letter to the Rockville Board of Elections Supervisors recommending that the Alliance of Rockville Citizens be drawn and quartered. For good measure, Mr. Arkin provided four pages of attachments to his letter.

The City of Rockville received his letter ten days after it was written. Two weeks after having written his first letter, Mr. Arkin sent the Board of Elections a second letter, this one composed of nine pages of single-spaced, typed, footnoted, and meticulously punctuated text upon which he wrote "Amended complaint (replaces complaint dated December 1, 1989)." It was received by the City of Rockville on Dec. 18.

I received copies of both Mr. Arkin's letters on Dec. 21 at a cost of the taxpayers of Rockville of $1.05 in postage and approximately $2.50 in photocopying expenses.

Having read both, I would not hesitate to say that either dissertation would qualify Mr. Arkin for a doctorate in political quackery. Through such authoritative evidence as might be gleaned from a reading of my columns, which Mr. Arkin has previously dismissed as infantile babbling, he presents a case of conjecture in which all

manner of convoluted reasoning and tortured logic are used to form a funeral pyre upon which he believes he has staked ARC, and to which he now asks the Board of Elections to kindly lend their torch.

Though I am confident at this point that Mr. Arkin's scattering of small tinder about a ropeless stake portends little serious risk to ARC or the Team for Rockville '89, I do wonder when the spark of all consuming hatred which imbues Mr. Arkin's soul and which he so carelessly strikes in the presence of his perceived enemies might well find fuel in the flatulence of his own rhetoric.

Perhaps Mr. Arkin has forgotten that it is unwise for childish people to play with matches.

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil Case No.: ———

RICHARD L. ARKIN, 522 West Deer Park Road,
Gaithersburg, Maryland 20877
Plaintiff

v.

GAITHERSBURG PUBLISHING COMPANY, INC. doing business as The Rockville Gazette, 250 Hungerford Drive, Rockville, Maryland 20850

and

STEPHEN H. FISHER, 1014 Neal Drive,
Rockville, Maryland 20850
Defendants

PRAYER FOR JURY TRIAL

Madame Clerk:

The above Plaintiff elects and prays to have this case tried before a jury.

/s/ Michael T. Benson
MICHAEL T. BENSON
2703 Waco Court
Baltimore, Maryland 21209
(301) 484-0358
Attorney for Plaintiff

Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-1255

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD L. ARKIN,
Petitioner

v.

GAITHERSBURG PUBLISHING COMPANY, INC. and
STEPHEN H. FISHER,
Respondents

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

---

REPLY TO BRIEF IN OPPOSITION

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Counsel for Petitioner

March 5, 1993

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STEPHEN H. FISHER,
Respondents

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

---

REPLY TO BRIEF IN OPPOSITION

Petitioner finds error or immateriality with designated parts of Respondents' Brief in Opposition for the reasons discussed below.

Petitioner maintains that the Respondents' Question Presented as stated at page (i) of Respondents' Brief is in error. What is at issue is not whether the statement at issue is defamatory or creates an actionable false impression; it is whether each statement at issue is capable of a defamatory construction. If each statement is susceptible of both a defamatory and a nondefamatory determination, it must be permitted to go to a jury to decide whether the statement is defamatory.

Respondents' Question Presented also omits to encompass false light invasion of privacy.

Respondents state at page (ii) that the Washington Post Company has an indirect substantial ownership interest in Respondent, Gaithersburg Publishing Company, Inc. This statement is immaterial. According to a spokesman for the Washington Post Company, the Washington Post Company completed acquisition of The Gaithersburg Gazette, Inc., sometime in 1992. At the time the article-in-suit was published, the Washington Post Company had no ownership interest in Respondent, Gaithersburg Publishing Company, Inc.

Respondents argue in their write-up of Jurisdiction that the principles governing the trial judge's role in determining whether particular statements are capable of bearing the defamatory meaning or false impression alleged are "concededly applicable state law." Respondents refer that statement to their footnote 1 and argue "The First Amendment does not prohibit defamation or invasion of privacy."

Petitioner responds that *Batson v. Shiflett,* 325 Md. 684, 688 (1992), links the First Amendment with the threshold question in a defamation suit as to whether the publication is defamatory in and of itself, or whether in light of extrinsic facts it is reasonably capable of a defamatory interpretation. *Batson, supra,* at 688, also ties the First Amendment to a defamation suit where disputed words are capable of more than one meaning, and states that the meaning to be attributed to those words is a question of fact for the jury. The First Amendment in defamation cases is linked with a showing of clear and convincing evidence of actual malice, i.e., knowledge of falsity or reckless disregard for the truth or falsity of the published matter. These factors have been pled in the Complaint herein.

With regard to false light invasion of privacy, this Court said in *Time Inc. v. Hill,* 385 U.S. 324 (1967), that the First

Amendment prohibited recovery under invasion of privacy in cases where the published matter was in the public interest unless the Plaintiff established that the Defendant acted with malice, i.e., with knowledge of falsity or with reckless disregard of the truth of the published matter. The false light invasion of privacy counts in the Complaint herein alleged those factors.

The prime differences in the two torts are damage to reputation in defamation, and Plaintiff finding the published false statement to be highly unreasonable by putting him/her into a false light without regard to damage to his/her reputation. State law allows satisfaction of a judgment on one of those two torts.

At page 2, Respondents add Maryland Rules 8-114(a) and (b). Those rules are erroneously applied by Respondents as discussed below.

At page 3, Respondents state that the article in suit appeared under a banner titled "OPINION." It should be noted, however, that the article-in-suit was separated from the word "OPINION" by two intervening articles. As can be seen from the copy of the article attached as an appendix to the opinion of the Court of Special Appeals, which did not contain the word "OPINION," it is unclear whether the word "OPINION" that appeared elsewhere on the page was intended to apply to the article-in-suit or was so perceived by readers. The Court of Special Appeals also did not find the word helpful to Respondents (Petitioner's Appendix 1A-29A).

At page 3, footnote 2, Respondents state that they provide a copy of Petitioner's entire Complaint in their appendix. Petitioner views the Counts being appealed as the only material ones and, because the other counts are immaterial, believed there was no necessity to include the other counts in the appendix to his petition for a writ of certiorari.

At page 3, Respondents state that one of their bases for filing a Motion to Dismiss the Complaint was that the Counts as pled did not satisfy the state law torts. Neither the motions judge in the trial court (P.A. 30A-32A) nor the Court of Special Appeals (P.A. 1A-29A) made mention in their opinions of any deficiency in elements of the torts. Because that point had not been at issue, Petitioner saw no reason to discussion it in his petition.

At page 4, Respondents claim that the Court of Special Appeals affirmed the trial court judgment on "both" grounds raised by Respondents in the circuit court and assert that the statements at issue were not reasonably capable of the defamatory meaning alleged. Petitioner does not recognize that either of the opinions indicates that any of the counts in the Complaint was otherwise deficient in any of its elements. Petitioner's view is that the courts' reasoning was confined to only one basis: that the lower courts felt that the statements at issue consisted of rhetorical hyperbole.

At page 4, Respondents claim that statements which constitute rhetorical hyperbole could not serve as the basis for defamation claims under the First Amendment. Petitioner's position is that if the statements at issue consist partly of rhetorical hyperbole and partly of statements purporting to be factual, they are not protected by the First Amendment. Petitioner does not agree with the lower court rulings that the statements at issue consist entirely of rhetorical hyperbole because those statements state or imply facts which are ascertainable for their truth about Petitioner.

At page 4, Respondents state that the Court of Special Appeals opinion disposed of Petitioner's invasion of privacy claims as being "closely related" to the defamation claims. Because the two torts have different elements, the dismissal of one does not automatically provide reason for dismissal of the other. For reasons discussed below, Petitioner disagrees with the lower court

rationale for dismissing the invasion of privacy claims, even though the two torts are "closely related."

At page 5, Respondents claim the Petition does not raise any substantial federal question because Petitioner did not identify any conflict between the decision of the Court of Special Appeals and a decision of another state court of last resort or a decision of this Court. However, a substantial federal question exists.

There are numerous cases in this court which hold that a public figure may be defamed by implication. Petitioner cited as an example *Embrey v. Holley,* 48 Md. App. 571 (1981), *aff'd in part, rev'd in part,* 293 Md. 128 (1982), where a public figure was imputed to be a looter. The holding in *Embrey, supra,* is inconsistent with the decision thus far in this case, where Petitioner, a public figure, was imputed to be dishonest, an arsonist, and an elections law violator. If the state's highest courts are inconsistent with their own decisions relating to federal questions, then this Court is not limited to granting certiorari in examples provided under Rule 10.1 (a), (b), and (c) as Respondents contend. Those examples neither control nor restrict the discretion of the Court. Sup. Ct. Rule 10.1, Fed. Civ. Jud. Proc. (1991).

At page 5, Respondents cited *Davis v. U.S.*, 417 U.S. 333, 340 (1974), for the proposition that intrastate conflicts or questions of state law are not properly reviewable by this Court. Petitioner sees that case not so holding. In that case, at issue were the laws of the U.S., not the laws of a state. The word "intrastate" was not used. "Intracircuit" was probably meant and that point was argued, but was not the final holding in the case as stated by Respondents.

At page 6, Respondents argue that "this Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied." Petitioner points out the inconsistency between the holdings in

Embrey, supra, and the case herein reflect either a misapprehension or gross misapplication by the courts below.

In footnote 4, Respondents argue that Petitioner's case is neither precedent within the rule of stare decisis nor persuasive authority and may not be cited for any purpose in unrelated cases under Maryland Rules 8-114(a) and (b). Petitioner is not claiming use of his case for any purpose other than to appeal its holding at this time, therefore, is not contravening the two above-cited Maryland rules.

At pages 6 and 7, Respondents argue that *Embrey, supra,* and *Batson, supra,* state "the threshold question of whether a publication is defamatory . . . is for the court upon reviewing the statement as a whole . . ." Yet *Batson, supra,* at p. 688, links that question as one under the First Amendment. Consequently, Respondents' argument that no federal question is raised is opposed by case law.

At page 9, Respondents contend that Counts I, III, and V of Arkin's Complaint were deficient in one or more elements, that the Court of Special Appeals found the dismissal justified on grounds that certain statements were neither libel *per se* nor libel *per quod.* Those conclusions did not arise from deficiency in elements, but in construing the statements at issue in their context to say why the Court of Special Appeals concluded that those statements were not capable of a defamatory determination and consisted only of rhetorical hyperbole.

Petitioner maintains that in Count I, the statement at issue in the article-in-suit constitutes libel *per se* and implies Arkin to be dishonest as a candidate by maintaining a permanent residence outside of Rockville while running for Rockville public office; that in Count III, parts of the article-in-suit constitute libel *per quod,* and imply to people who knew that Arkin's house burned down that he committed arson; and that in Count V, the statement

at issue constitutes libel *per se*, and states or implies that Arkin violated Rockville election laws by running with an improperly constituted election committee. Petitioner concedes that other derogatory statements about Arkin, statements that are not at issue in this case, constitute rhetorical hyperbole, but maintains that they do not render the statements at issue as non-actionable for libel.

At page 9, Respondents argue that the false light invasion of privacy counts II, IV, and VI were properly dismissed because they and defamation are "closely related and the same considerations and legal standards govern both." Petitioner reiterates his earlier argument that even though the two torts contain similar elements, certain elements are dissimilar and a dismissal of the defamation counts does not automatically provide reason to dismiss the false light invasion of privacy claims.

The Court of Special Appeals (P.A. 23A) states that for there to be liability in false light invasion of privacy, the statement publicized must give a false impression, *although the statement does not have to be defamatory in order for liability to attach.* The Court of Special Appeals (P.A. 24A) states that it is a question of law as to whether the statements in context of the publication place the plaintiff in a "false light," i.e., it is "highly offensive" to a reasonable person. The totality of the effect of the nonactionable hyperbolic statements together with the statements at issue for actionability in defamation and in false light invasion of privacy (portrayed as an arsonist, dishonest, and as an election law violator subject to imprisonment) provide considerable weight to a trier of fact to conclude that Petitioner could consider them "highly offensive." Under the First Amendment, false light invasion of privacy is actionable, *Time, supra.*

Most defamation cases involve one defamatory statement in a publication. This case involves several of them in one publication. The Court's deciding this case would be useful to

illustrate that multiple defamations can occur in a single publication, and that when those defamations accompany other derogatory, but not defamatory statements, the multitude of nonactionable statements does not render statements at issue as nonactionable. Petitioner is not aware of any such case being published. Accordingly, review of this case is in the public interest.

At page 10, Respondents state that Petitioner cited certain cases that truthful statements are not shielded from claims of defamation and false light invasion of privacy, and contend that these cases hold that a publication consisting of both true and false statements may be actionable as to the portion found false. Petitioner cited the cases of *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966), *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) to illustrate that a material omission combined with true statements is tantamount to an untruth and applied that principle to this case where we have true statements without the whole story creating a false impression of Petitioner in several ways. Accordingly, Petitioner disagrees with any finding that truth is a complete defense to libel, when, as in this case, the truthful statements are mixed with untrue statements and material omissions of fact to impart false and untruthful impressions.

At page 10, Respondents discuss *Embrey, supra,* in footnote 6. Petitioner does not glean from the *Embrey* appellate opinions what Respondents contend in their footnote.

At pages 10 and 11, Respondents state, "In the present case, however, nothing was false or defamatory as alleged" based on the Court of Special Appeals opinion (P.A. 1A-29A). Because the Court of Special Appeals opinion is at issue, Petitioner does not agree with Respondents' conclusory statement.

At page 11, Respondents cite *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 7 (1990), for the proposition that the statements at issue read in context of the article as a whole were marked by the "sort of loose, figurative or hyperbolic language which would negate the impression" that the article stated objective facts about Arkin. Petitioner finds that the hyperbolic statements in the article-in-suit amplify the tendency of the statements at issue to be defamatory because the hyperbolic statements read together with false statements appearing to be factual make the false statements more believable to the reader and impart false and untruthful impressions. They do not make the statements at issue nonactionable hyperbolic statements.

At page 11, Respondents cite *Blouin v. Anton,* 431 A.2d 489, 490-91 (Vt. 1981) that statements used in the context of a political skirmish could not have been believed to convey objective fact, and apply that holding to this case. Petitioner points out that in *Blouin,* the statement at issue was made while a political campaign was under way, while in this case, the statements at issue were made some 50 days after election day. In *A. S. Abell v. Barnes,* 258 Md. 56 (1970), *cert. denied,* 403 U.S. 921 (1971), Barnes had been a candidate for public office. Two days after the election, Defendant A.S. Abell published an article claiming Barnes failed to make a required filing with the Board of Election Supervisors, a violation of the election law. The Court of Appeals held that the statement was libel *per se* because it suggested violation of law. Because testimony showed the reporter published his story as part of an honest mistake, malice was not shown, however. Accordingly, this case is inapposite with *Blouin.*

CONCLUSION

For reasons set forth in the Petition for a Writ of Certiorari, and in the Reply to Respondents' Brief in Opposition to the

Petition, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted

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